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IN THE

Supreme Court of the United States

THE ATTORNEY GENERAL OF CANADA,
Petitioner,

v.

RJ REYNOLDS TOBACCO HOLDINGS, INC., ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

SUPPLEMENTAL BRIEF FOR PETITIONER

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10 pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
ARGUMENT	1
CONCLUSION	7

TABLE OF AUTHORITIES

CASES

Page(s)

Ackermann v. Levine, 788 F.2d 830 (2d Cir. 1986) 5
Agency Holding Corp. v. Malley-Duff & Associates, Inc., 483 U.S. 143 (1987) 2
Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964) 4, 5
European Community v. RJR Nabisco, Inc., 150 F. Supp. 2d 456 (E.D.N.Y. 2001) 6
Loucks v. Standard Oil Co., 224 N.Y. 99 (1918) 5
Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479 (1985) 2, 3
United States v. Boots, 80 F.3d 580 (1st Cir.), *cert. denied*, 519 U.S. 905 (1996) 6
United States v. Pasquantino, No. 01-4463, 2002 WL 31159094 (4th Cir. Sept. 30, 2002) 4, 6
United States v. Turkette, 452 U.S. 576 (1981) 3

TREATISES

Restatement (Third) of Foreign Relations Law § 482 (1987) 5

INTERNATIONAL AUTHORITIES

United States v. Harden, [1963] S.C.R. 366 (Can.) 4

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The Solicitor General acknowledges that this case "raises issues that are of importance to both Canada and the United States." U.S. Br. 6. He does not dispute that this case presents a good vehicle for addressing those issues. He disagrees with Canada on the merits, but he makes no persuasive argument against review.

1. The Solicitor General recognizes that "[t]he United States has a strong interest in combatting . . . cross-border illegal activity," that Canada has "a strong interest in recovering damages for financial injuries caused to it by fraud," and that "both countries have a mutual interest in collaborative efforts to prevent and deter . . . international smuggling schemes" like the one involved in this case. *Id.* But he greatly understates the importance of the question presented, because he focuses on the interests of the Executive Branch

and not on the statute Congress enacted. RICO gives "any person," including foreign governments, the right to sue for damages, precisely because Congress did not want to leave the war against large-scale illegal activities solely to the discretion and resources of public prosecutors. *See Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 151 (1987); *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 497-500 (1985); *see especially id.* at 490 n.9 (reviewing problems with making civil relief dependent on criminal actions). The Solicitor General ignores the United States' fundamental interest in ensuring that RICO is enforced as Congress wrote it.

2. The Solicitor General also recognizes (U.S. Br. 10-11) that Canada's quarrel in this case is not with the revenue rule, but with the Second Circuit's unprecedented expansion of the traditional rule to create an unwritten exception to RICO and other U.S. laws. Canada is not seeking to enforce its tax laws in the United States, but to enforce its rights under U.S. substantive law. The question is not whether RICO "authorize[s] a suit that would otherwise be barred by the revenue rule" (*id.* at 11), but rather why the revenue rule should somehow bar a claim that RICO expressly provides, addressing misconduct committed in the United States, by U.S. persons, in violation of U.S. law.

a. The cornerstone of the Solicitor General's position is that Canada is asserting a Canadian tax claim, and that the revenue rule bars even "indirect" claims for foreign taxes. *Id.* at 11-13. But it is simply incorrect to characterize Canada's U.S. RICO claim as a Canadian tax claim, direct or indirect. Respondents are not even the Canadian taxpayers; they committed mail and wire fraud in the United States, for which Canada is pursuing them under U.S. law. It is not a *defense* to that action that respondents' misconduct enabled *other* persons to evade Canadian taxes. Canada Reply Br. 1-

2.[1] All of the "indirect" enforcement cases cited by the Solicitor General (U.S. Br. 12) were cases where the force of the claims came from foreign revenue laws, and the forum court was a mere vehicle into which the foreign nation sought to project its sovereignty. Canada Reply Br. 4-5 (discussing cases). No revenue rule case before this one has ever restricted the forum state from applying its own law.

The Solicitor General's only response on this point is the assertion that "[m]any, if not most, schemes to avoid the payment of [foreign] taxes [could] be recharacterized" as violations of U.S. law. U.S. Br. 13. But that is wrong. It is not hard to determine whether a foreign nation is making a bona fide claim of violation of U.S. law, in the United States, by U.S. actors—as Canada clearly is in this case.

b. The Solicitor General suggests (*id.* at 13-14) that the court of appeals' refusal to enforce RICO shows a proper concern for the separation of powers. But with all due respect, it is the Solicitor General who would invade another Branch's constitutional powers. Congress enacted a statute giving "any person" the right to sue for U.S. frauds of the kind committed here. Indeed, the Solicitor General frankly concedes that the "general language" of RICO would permit Canada's claim. *Id.* There is no justification for allowing the Executive Branch and the courts to carve discretionary exceptions out of the statute as written.

The Solicitor General argues that there is "no evidence" that Congress intended RICO to cover Canada's claim; or that Congress intended to permit enforcement of RICO in the

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[1] The fraud defendants in this case are not the persons on whom Canadian law imposes the taxes and duties that were evaded. *Id.* at 2. The Solicitor General's suggestion that Canada could proceed against them in its own courts (U.S. Br. 17) ignores that fact. More fundamentally, RICO was designed to supplement other remedies for lawbreaking in the United States, and that is what occurred here. *See, e.g., Sedima*, 473 U.S. at 498; *United States v. Turkette*, 452 U.S. 576, 586-587 (1981).

absence of some sort of "reciprocity"; or that Congress intended to interfere with the Executive Branch's prerogative to decide tax enforcement policy through treaties. *Id.* But the Solicitor General has it backwards: RICO's plain language concededly embraces Canada's cause of action. This Court does not ordinarily demand special evidence that Congress meant what it said.[2]

There is, moreover, no requirement of "reciprocity." Canada's right to sue under RICO does not depend on whether Canada has enacted a RICO-like statute under which the United States could sue in a Canadian court for a Canada-based fraud. *See Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 408-412 (1964). There is also no reason to believe that Canada would not allow the United States to enforce any comparable right it might have under Canadian law.[3] While it is true that U.S. "courts can provide no guarantee that the United States may enforce a similar claim in the courts of a foreign sovereign" (U.S. Br. 13), that point is irrelevant where Congress has created a U.S. cause of action in favor of "[a]ny person."

Neither any Canada-U.S. Treaty nor the treaty-making prerogative of the Executive Branch suggests any reason for

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[2] The Solicitor General's assertion that Congress enacted RICO "against the backdrop" of the revenue rule begs the question. At the time, the revenue rule had never been interpreted to preclude U.S. courts from hearing any action arising under U.S. law, and Congress could not have thought that the rule as traditionally applied would bar a RICO claim. *See United States v. Pasquantino*, No. 01-4463, 2002 WL 31159094, at *7 (4th Cir. Sept. 30, 2002) (Hamilton, J., dissenting).

[3] *United States v. Harden*, [1963] S.C.R. 366 (Can.), on which the Solicitor General relies (U.S. Br. 13), was a case in which the United States sought to collect in Canada on a *tax judgment* entered by a U.S. court, and is inapposite here. *See* Canada Reply Br. 4-5. *Harden* is a classic revenue rule case, and neither holds nor "suggests" (U.S. Br. 13) that a foreign government could not proceed in a Canadian court on a cause of action created by Canadian law and "comparable" (*id.*) to RICO.

untethered Executive Branch discretion to carve out exceptions to RICO. Treaties set forth the occasions on which Country A will assist Country B in enforcing B's laws; they do not speak to B's rights under A's substantive law. *See* Canada Reply Br. 6.[4] The implication that treaties somehow bar U.S. courts from applying U.S. law against U.S. citizens is obviously wrong. The Solicitor General correctly points out that the Second Circuit's decision effectively "reserves the decision" whether to enforce RICO in a case like Canada's entirely to the Executive. U.S. Br. 17. But there is nothing "proper[]" (*id.*) about that decision where Congress has established a contrary enforcement regime in the statute itself.

3. Finally, the Solicitor General argues that there is no need for immediate review because—he says—the decision below bars only civil claims, and leaves intact the ability of the Executive Branch to bring criminal RICO prosecutions. *Id.* at 7, 15-17. But there is no obvious basis in the revenue

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[4] The Solicitor General expresses concern that "less friendly" countries may sue next. U.S. Br. 14. But if those countries can prove an actionable claim under a U.S. statute, it is well established that they may sue in the United States. *See Sabbatino*, 376 U.S. at 410 ("This Court would hardly be competent to undertake assessments of varying degrees of friendliness or its absence, and, lacking some definite touchstone for determination, we are constrained to consider any relationship, short of war, with a recognized sovereign power as embracing the privilege of resorting to United States courts."). If in some particular case the claim were repugnant to U.S. public policy, legal doctrine independent of the revenue rule would allow a U.S. court to stay its hand. *Cf., e.g.*, Restatement (Third) of Foreign Relations Law § 482(2) (1987) (U.S. court need not enforce foreign judgment if repugnant to U.S. public policy); *Ackermann v. Levine*, 788 F.2d 830, 843-844 (2d Cir. 1986) (applying German law); *Loucks v. Standard Oil Co.*, 224 N.Y. 99, 110-111 (1918) (state court may refuse to enforce law of another state, but only if it "violate[s] some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal"). But such a case should be the rare exception. There is no basis for rejecting all claims of all foreign countries, as the Second Circuit did.

rule—and certainly none in RICO—for treating civil and criminal cases differently, and two other federal circuits (the First and the Fourth) have now expressly declined to do so, applying the revenue rule to bar federal criminal prosecutions of smuggling claims (in both cases involving schemes to defraud Canada). *See United States v. Pasquantino*, No. 01-4463, 2002 WL 31159094 (4th Cir. Sept. 30, 2002); *United States v. Boots*, 80 F.3d 580 (1st Cir.), *cert. denied*, 519 U.S. 905 (1996). The Solicitor General's confidence in his continuing ability to prosecute is hardly justified.

The Solicitor General does not suggest that delaying review would assist the Court in its eventual consideration of the important question presented here, or offer any reason why this case would not be an appropriate vehicle for the Court's review. The question has been thoroughly examined in the lower courts, including in Judge Calabresi's dissent in this case, and in Judge Garaufis's first opinion in *European Community v. RJR Nabisco, Inc.*, 150 F. Supp. 2d 456, 483-86 (E.D.N.Y. 2001), and has resulted in sharp and clearly expressed disagreement among the judges who have considered it.

Finally, there is a real danger that the Second Circuit's ill-advised expansion of the revenue rule will be followed in other countries, sowing error in the law (and creating safe havens) that this Court will have no power to correct. The error below clearly "raises issues that are of importance to both Canada and the United States." U.S. Br. 6. The time for review is now.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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